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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

Nos. 498-499-500

ROBERT BARTLETT, BOTH INDIVIDUALLY AND AS TRUSTEE,
Appellant,

vs.

GROSS INCOME TAX DIVISION, STATE OF INDIANA, ET AL.,
Appellee

ON APPEALS FROM THE SUPREME COURT OF INDIANA

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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Appellee

ON APPEALS FROM THE SUPREME COURT OF INDIANA

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

MAY IT PLEASE THE COURT:

The Gross Income Tax Division, State of Indiana, appellee herein, for its Statement Opposing Jurisdiction and in support of its Motion to Dismiss, respectfully shows to this Honorable Court: *

I

The Nature of the Action

This action, commenced in the Marion Circuit Court of Marion County, Indiana (19th Judicial Circuit of Indiana),

* (Clerk's Note.—See stipulation as to printing statements opposing jurisdiction and motions to dismiss—printed as appendix hereto.)

and thereafter appealed to the Supreme Court of Indiana, is an action to recover taxes assessed and collected by appellee for the year 1937, under the Indiana Gross Income Tax Act of 1933, and that Act as amended by Chapter 117 of the Indiana Acts of 1937. (Indiana Acts of 1933, Chapter 50, p. 388, and Indiana Acts of 1937, Chapter 117, p. 604).

II

Condensed Recital of Facts

The entire evidence in this cause of action consists of agreed Stipulations of Fact and Exhibits thereto, which the appellee hereinafter condenses for the purpose of brevity, and which said condensation contains all facts material to the question sought to be presented, and is as follows:

During the taxable period herein involved:

1. The Department of Treasury was the agency of the State of Indiana charged with the administration and enforcement of the Gross Income Tax Law of Indiana. The appellee, Gross Income Tax Division, is a legal entity now charged with the administration and enforcement of said Act and is the successor to the former Department of Treasury.

2. The appellant, Robert Bartlett, both individually and as trustee, was a resident of and domiciled in the State of Illinois, acting as trustee pursuant to two separate agreements, and as such was engaged in the sale of real estate with his principal office in Chicago, Illinois.

3. Said appellant became the owner by purchase in former years of real estate located wholly within the confines of the State of Indiana, which said real estate was known as the "Beverly Shores Addition" and the "Lake Shore Addition," which said Additions had, prior to purchase, been subdivided into lots for the purpose of sale and certain improvements made thereon.

4. Said appellant maintained an "on the spot" office in Indiana real estate, which said office was kept open during business hours by agents and employees of the appellant.

5. Said Indiana lots were sold both for cash and pursuant to real estate installment sales contracts.

6. Pursuant to the terms of said real estate installment sales contracts, appellant-vendor covenanted and agreed to convey or cause to be conveyed to the purchaser in fee simple by a trustee's deed specific real estat by Lot and Block number with legal description, all of hich said described real estate was in Indiana, subject certain restrictions and covenants, each of which was to be construed as a covenant running with the land and also subject to encumbrances such as taxes, zoning laws, etc.

7. Pursuant to the terms of said real estate installment sales contracts, appellant-vendor received interest payments on the unpaid balance of the purchase price, together with said principal installment payments.

8. Upon full payment, conveyance was made to the purchaser of the particular Indiana real estate by a general warranty deed in accordance with and pursuant to the terms and cor litions of said real estate installment sales contracts.

9. The execution of said real estate installment sales contracts, the payments thereon, and the execution of deeds upon full payment, all occurred in the City of Chicago, Illinois.

10. All deeds, as required by statute, were recorded in Indiana.

11. Not less than 98% of the purchasers of said Indiana lots were non-residents of Indiana living in or near Chicago, Illinois, and not less than 98% of the total gross receipts from the sale of said Indiana lots were received by the appellant from non-residents of the State of Indiana.

12. Notwithstanding said "on the spot" office in Indiana, to effect the sale of said Indiana lots, appellant

incurred considerable operational expense in connection with his Chicago office for salaries of employees and salesmen, office overhead, etc., and transportation costs in transporting prospective purchasers to said lot sites in Indiana.

13. Within the statutory period, upon the entire gross receipts from said sales of Indiana real estate, the appellee levied, assessed and collected Gross Income Tax in accord with the applicable provisions, rates and exemptions of the Gross Income Tax Law, and said tax was paid by the appellant under protest.

14. Within the applicable time allowed by statute, the appellant filed his Claim for Refund for a recovery of the entire tax so paid, which said Claim for Refund, after a hearing, was denied by the appellee.

III

The Statute Involved

The statute involved is the Indiana Gross Income Tax Law of 1933 (Chapter 50, Indiana Acts of 1933, p. 388) and that Act as amended by Chapter 117, Indiana Acts of 1937, p. 604. This statute as now amended may be found complete with all amendments to date in Burns' Indiana Statutes Annotated, 1933, Vol. 11, (1943 Replacement) Section 64-2601 to 64-2635, inclusive.

IV

The Opinion Below

The opinion, decision, and judgment of the Indiana Supreme Court, as yet unreported officially, is unofficially reported in 93 N. E. (2d) 174 of the West Reporter System.

V

The Inadequacy of Appellant's "Assignment of Errors"

While the appellee will hereinafter discuss the absence of a substantial Federal question, it should first be stated that the appellee seriously doubts the sufficiency of appellant's "Assignment of Errors" to present any question to this Honorable Court, for the reason that said "Assignment of Errors" does not conform to the requisites of Rule 9 of the Supreme Court of the United States. Appellee refers specifically to that portion of Rule 9 which requires that said "Assignment of Errors" "shall set out separately and particularly each error asserted."

Careful analysis of appellant's "Assignment of Errors" discloses the following:

(a) Specification No. 1 is a colossal undertaking, attempting to embrace in one specification and sentence, three of the most studied, discussed, and litigated provisions of the Constitution of the United States, i. e., the due process clause, the commerce clause, and the equal privileges and immunities clause. These three alleged errors are not "set out separately and particularly". Instead, they are combined and without any degree of particularity. They are stated in the most general, vague, and indefinite manner possible. At best, they are no more than bare and indefinite conclusions, and do not present clear, concise, separate and particular statements of the material points upon which the appellant intends to rely.

(b) Specification No. 2 likewise combines several separate and distinct alleged errors. These alleged errors are also general, vague and uncertain and do not state with sufficient particularity the material points upon which the appellant intends to rely. This specification is a conglomeration of several varied, general and indefinite alleged errors and does not "set out

separately and particularly each error asserted", as required by Rule 9 of the Supreme Court of the United States.

(c) Specification No. 3 is barren of any element, fact or law upon which a substantial Federal question could possibly be founded, and is couched in the greatest degree of generality imaginable.

It would seem to the appellee that appellant's "Assignment of Errors" completely ignores and fails to conform to the requirements of Rule 9 of the Supreme Court of the United States as construed by this Honorable Court in the case of *Seaboard Air Line Ry.* v. *Watson* (1932), 287 U. S. 86, at p. 91, and kindred cases, and as explained in the recent treatise "Supreme Court Practice" by Robert L. Stern and Eugene Gressman at pp. 210 and 211 thereof.

Appellant's "Assignment of Errors", as filed in the Supreme Court of Indiana on December 7, 1950, and as served upon appellee on the same date, and as will be found in the Transcript of the Record in this appeal, omitting caption and signatures only, is verbatim, as follows:

"Assignment of Errors

"In support of his Petition for Appeal to the Supreme Court of the United States, Robert Bartlett, both individually and as Trustee, Appellant in said appeal, assigns the following errors:

The Supreme Court of Indiana erred:

1. In failing to hold that the gross income Tax Act of 1933, as amended, if held to authorize the taxes upon Appellant's gross income, would be unconstitutional and void as violative of the following provisions of the Federal Constitution; the due process clause of the Fourteenth Amendment, Section 8 of Article I relating to commerce, and Section 2 of Article IV relating to privileges and immunities of citizens.

2. In stating that the Marion Circuit Court held real estate to be the subject of interstate commerce; in holding that the taxes in question do not violate the due process clause of the Federal Constitution "in that immovable property is exclusively subject to the laws of the government in which it is located"; in holding that the income involved in these proceedings consists entirely of receipts from the sale of lots in Indiana; and in reversing the judgment of the Marion Circuit Court with instructions to render judgment for and in behalf of appellees.

3. In failing to affirm the judgment of the Marion Circuit Court.

WHEREFORE, Appellant prays that the judgment or decree of the Supreme Court of Indiana appealed from be reversed and for such further and other relief as the Court may deem fit and proper."

VI

No Substantial Federal Question Is Presented by the Attempted Appeal

The appellee, Gross Income Tax Division, earnestly believes that a consideration of certain basic, long established principles will show beyond any doubt, that there is no substantial Federal question presented by this attempted appeal. These principles, upon which the appellee relies in opposing the jurisdiction of this Honorable Court, are as follows:

A

THE LEVY OF THE TAX HEREIN DOES NOT VIOLATE THE COMMERCE CLAUSE

1. The gross income herein taxed was derived solely from the sale of Indiana land. The source or origin of the gross receipts was Indiana land, and, like the

land, the source was immovable. The land and the source were one and the same. Being immovable, real estate is not a subject of interstate commerce.

U. S. v. *Crosby* (1812), 7 Cranch 115, at p. 116;
Munday v. *Wisconsin Trust Co. et al.* (1920) 252 U. S. 499, at p. 503;
Blan v. *Hollywood Realty Co.*, (1928) 118 So. 253; at p. 256;
15 C. J. S. Commerce, Section 17, pp. 277, 278.

(It will be noted that all case authorities relied upon by appellant on the subject of source, relate to *movable* tangible personal property).

2. The mere fact that the appellant and 98% of the purchasers of his Indiana land were non-residents of the State of Indiana is not of itself controlling: The element of residence of the contracting parties is not determinative. "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question."

Western Live Stock v. *Bureau* (1938) 303 U. S. 250, at p. 253, and cases there cited.

In the case herein, the basic performance required of appellant was the transfer of possession of and title to specific Indiana real estate. Possession by the purchaser could be acquired only at the land site in Indiana, and the transfer of title was valid as to third persons only upon recordation in the County in Indiana in which said real estate was located.

3. The sale of the Indiana real estate herein involved, being basically a local-Indiana-transaction, could not be transformed into an interstate commerce transaction by the form of the contract utilized. In determining whether or not an activity is interstate or local, the matter is a practical one in which *substance*, and not form, controls.

15 C. J. S. Commerce, Section 18, pp. 278, 279.

"• • • it is not within the power of the parties by the form of their contract to convert what was exclusively a local business subject to state control, into an interstate commerce business protected by the Commerce Clause."

Browning v. *Waycross* (1914) 233 U. S. 16 at p. 23.

"Real estate is sold and transferred by the execution and delivery of a deed from the vendor to the vendee; *yet no one would seriously contend that in such a transaction the vendor was selling a deed instead of selling real estate.*" (Emphasis ours.)

Brown v. *Cummins Distilleries Corp.* (1944) 53 Fed. Supp. 659, at p. 664.

4. The out-of-state expense items were but incident to the purely local activity of selling Indiana Real Estate.

Dept. of Treasury v. *Ingram-Richardson Mfg. Co.* (1941) 313 U. S. 252, at p. 255.

5. The possibility of multiple taxation is non-existent.

Senior v. *Braden* (1935) 295 U. S. 422.

6. Since the income herein taxed was derived solely from sources within the State of Indiana, there is nothing to apportion between Indiana and other states.

Dept. of Treasury v. *Wood Corp.* (1941) 313 U. S. 62 at p. 67.

B

THE LEVY OF THE TAX HEREIN DOES NOT VIOLATE THE EQUAL PRIVILEGES AND IMMUNITIES CLAUSE

7. The Record herein will show conclusively that the appellant, a non-resident of the State of Indiana, acquired said Indiana real estate, enjoyed the privileges of ownership thereof, and was accorded the rights of

disposition thereof on the same and equal footing as if he were an Indiana resident.

8. Both the Gross Income Tax Law of 1933, and its administration and enforcement treat residents and non-residents alike under the same circumstances.

Section 2 of the Gross Income Tax Law, Chapter 50 of the Indiana Acts of 1933, and said section of Chapter 117 of the Indiana Acts of 1937, Burns' Indiana Statutes Annotated (1933) Section 64-2602, provide as follows:

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

"Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be

> in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

The Act, both as originally enacted in 1933 and as amended in 1937, thus taxes non-residents only upon their income from sources within Indiana.

Shaffer v. Carter (1920) 252 U. S. 37, at pp. 52, 57.

Regulation 193, Rule 6 of the Gross Income Tax Regulations, revised in 1935, provides:

> "6. Sale of Real Estate Located Outside of Indiana. Persons resident and/or domiciled in Indiana will not be required to report and pay tax upon any of the proceeds from the sale of real estate owned by them and situated in states other than the State of Indiana."

Also Regulation 3500, Rule 6, of the Gross Income Tax Regulations revised in 1937, provides:

> "Rule 6—Sale of Real Estate Located Outside of Indiana. Persons resident and/or domiciled in Indiana will not be required to report and pay tax upon any of the proceeds from the sale of real estate owned by them and situated in states other than the State of Indiana."

These Regulations deal only with income of residents *from sources outside-of-the State of Indiana.* They are clearly for the purpose of placing *residents of Indiana on an equal footing with non-residents,* since, of course, Indiana has no jurisdiction over real estate located in other states. A similar Regulation is not required for non-residents for the simple reason that the Gross Income Tax Law itself as to non-residents imposes the tax only upon their income from Indiana sources.

The rates and exemptions, both in the original and amended Act, are imposed and applied alike as to both residents and non-residents. There is no rate nor exemption based upon the residence or non-residence of the taxpayer.

Regulation 3600 of the Regulations of the Gross Income Tax Division, as revised in 1937, provide as follows:

> "Regulation 3600. Extent of Tax Liability of Non-Residents. Section 2 of the gross income tax Act provides that the tax shall be imposed upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana. *Since non-residents are entitled to the same annual exemption as residents,* therefore they will be liable for making return of and payment of tax upon all gross receipts derived from Indiana sources in excess of $1,000 in any calendar year." (Emphasis ours)

The appellant admitted by agreed Stipulation B, Par. M, as found in the Record, as follows:

> "The Department of Treasury of the State of Indiana in administering and enforcing the Gross Income Tax Act of 1933, both as originally enacted and as administered, has, during the tax years in question, *uniformly allowed the exemptions specified by the Act.* * * *" (Emphasis ours)

Compare: *Travis* v. *Yale & Towne Mfg. Co.* (1920) 252 U. S. 60 at p. 80.

Section 2 of Article IV of the United States Constitution means that a *citizen of Illinois* is entitled to acquire, own, and dispose of property *in Indiana* on the same basis as *citizens of Indiana* are permitted to acquire, own, and dispose of property *in Indiana.* So long as *citizens and non-citizens* are treated equally with reference to the land *in Indiana,* as was done in this case, there cannot possibly be any infringements upon the guarantees of Section 2 of Article IV of the Constitution of the United States.

Appellant's theory of equalization between residents and

non-residents would in reality discriminate *in favor of non-residents and against residents. It would exempt non-residents* from the tax on their gross receipts derived *from the sale of Indiana land,* while imposing such a tax upon *Indiana residents* on income *from the same source.*

Likewise, since the Act allows no deductions of expenses, the appellant's Illinois operational expenses cannot be deducted. He is treated precisely as Indiana residents. To allow said deductions to appellant would, in effect, make the tax a *net* income tax as to *non-residents* and a *gross* income tax as to *residents.*

Nor is an apportionment based upon said Illinois operational expenses justifiable for to so allow would in effect make the sale of *Indiana real estate* by *non-residents* an *interstate* sale, yet the sale of *Indiana real estate* by *Indiana residents* would be a *local* Indiana sale.

Section 2 of Article IV of the Federal Constitution does not give to citizens of other states greater privileges in a particular State than those enjoyed by citizens of that State.

C

The Levy of the Tax Herein Does Not Violate the Due Process Clause

9. The Illinois events do not destroy the nexus between the tax and the gross income from the sale of Indiana real estate.

> "The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less *merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that the tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transac-*

tions within a state for which the tax is an exaction.'' (Emphasis ours)

Wisconsin v. *J. C. Penney Co.* (1940) 311 U. S. 435, at pp. 444, 445, and cases there cited.

10. The fact that it required the personal skill and management of appellant to bring his income from Indiana real estate to fruition, *and that his management was exerted from a place of business in another State, does not deprive Indiana of jurisdiction to tax the income which arose within its own borders.* The personal element, cannot, *by any friction,* oust the jurisdiction of the State within which the income actually arises and whose authority over it operates *in rem.*

Shaffer v. *Carter* (1920) 252 U. S. 37, at p. 55.

The sales of appellant's Indiana real estate could have been handled completely by his "on the spot" Indiana office.

11. Indiana real estate, being the source of the income herein taxed and being immovable property, is exclusively subject to the laws of Indiana as respects its acquisition, disposition, devolution, and taxation. (lex loci rei sitae).

15 C. J. S. Conflict of Laws. Section 19 (a), pp. 936, 937, 938.

Restatement, Conflict of Laws, Section 215 et seq.

11 Am. Jur. Conflict of Laws, Section 30, p. 328.

United States v. *Fox* (1876) 94 U. S. 315, at pp. 320, 321.

Curry v. *McCanless* (1938) 307 U. S. 357, at p. 363.

12. Indiana's right to tax the income from the sale of Indiana real estate is closely akin to the right to tax the real estate itself.

Dravo Contracting Co. v. *James* (1940) 114 Fed. (2d) 242, at p. 245.

12. *The contract payments were not the repayment of borrowed money.* The purchaser did not borrow money from the appellant-vendor. The purchase price was a *present value* figure. Since this price was not paid upon the execution of the agreement, the appel-

lant-vendor was entitled to interest on the unpaid balance so that he would receive the equivalent of the *present value* through deferred payments. In other words, the scheme was merely the *amortization* of a *contingent liability.* It was *not a fixed liability as in the case of borrowed money.* The purchaser could default, and his only liability was that past payments were thereby forfeited as liquidated damages. The interest was merely a finance charge and *an incident of an indivisible contract for the sale of Indiana real estate. Thus, both the principal and interest payments were inseparably related to an Indiana real estate sale.*

The appellee, Gross Income Tax Division, earnestly believes that the appellant's "Assignment of Errors" does not adequately present any question for review by this Honorable Court as required by Rule 9 of the Rules of the Supreme Court of the United States, and further asserts that the questions attempted to be presented do not raise any substantial Federal question.

We further submit that the questions attempted to be presented in this appeal, have long ago been so definitely determined, that no substantial question is presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States.

Wherefore, appellee respectfully moves that the within appeal be dismissed and for such other relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1950

No. 498, 499, 500

ROBERT BARTLETT, Both Individually and as Trustee, Appellant,

vs.

GROSS INCOME TAX DIVISION, STATE OF INDIANA; THE INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION; INDIANA STATE REVENUE BOARD; THE HONORABLE HENRY F. SCHRICKER, Governor, F. SHIRLEY WILCOX, Treasurer, and JAMES M. PROPST, Auditor, respectively, of the State of Indiana, as and constituting the Revenue Board of the Indiana Department of State Revenue, and as members of the Board of the Department of Treasury, and

THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, Appellees

On Appeal from the Supreme Court of the State of Indiana

(Indiana Supreme Court Cause No. 28610)

Stipulation as to Printing Appellant's Jurisdictional Statement and Appellees' Statement Opposing Jurisdiction and Motion to Dismiss

Appellant appeals from three judgments of the Supreme Court of Indiana rendered in three cases known, respectively, as Causes Nos. 28609, 28610 and 28611 in the Supreme Court of Indiana. The issues in the three cases are the same and involve taxes assessed under the Indiana Gross Income Tax Act of 1933, as amended. Cause No. 28609 involves the year 1935, Cause No. 28610 involves the year 1936, and Cause No. 28611 involves the year 1937. The facts in each case are substantially the same with the excep-

tion of the amount of taxes and year involved. The three cases were consolidated in the Indiana Supreme Court for briefing and argument.

With the exception of the amount of taxes and year involved, Appellant's Jurisdictional Statement and Appellee's Statement Opposing Jurisdiction and Motion To Dismiss are the same in each of the three cases.

In order to minimize the work of the Court and avoid duplication in printing, it is stipulated that, if agreeable to the Court and to the Clerk, Appellant's Jurisdictional Statement and Appellees' Statement Opposing Jurisdiction and Motion To Dismiss in Indiana Supreme Court Case No. 28611, only, shall be printed, and that when printed they shall be deemed and considered to be printed copies of Appellant's Jurisdictional Statement and of Appellees' Statement Opposing Jurisdiction and Motion To Dismiss in said Cause No. 28609 and also in said Causes Nos. 28610 and 28611.

Dated January 15th, 1951.

Respectfully submitted,

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IN THE

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OCTOBER TERM, A. D. 1950.

No.

ROBERT BARTLETT, Both Individually and as Trustee,
Appellant,

vs.

GROSS INCOME TAX DIVISION, STATE OF INDIANA; THE INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION; INDIANA STATE REVENUE BOARD; THE HONORABLE HENRY F. SCHRICKER, Governor, F. SHIRLEY WILCOX, Treasurer, and JAMES M. PROPST, Auditor, respectively, of the State of Indiana, as and constituting the Revenue Board of the Indiana Department of State Revenue, and as members of the Board of the Department of Treasury, and

THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
Appellees.

On Appeal From The Supreme Court Of The State Of Indiana
(Indiana Supreme Court Cause No. 28609)

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS APPEAL.

On December 20, 1950 Appellees served upon Appellant's counsel their Statement Opposing Jurisdiction And Motion To Dismiss.

Pursuant to Rules 12(3) and 7(3) of the Supreme Court of The United States, as amended, Appellant files this opposing Brief.

I.

Appellees' Condensed Recital Of Facts.

The Condensed Recital Of Facts contained in Appellees' Motion is wholly insufficient. It omits many material facts found in the Stipulations of Fact signed by Appellees' counsel and filed in the Marion Circuit Court, which are embodied in Findings of Fact made by that Court. These Findings of Fact are set forth verbatim in Appellant's Statement As To Jurisdiction.

Paragraph 5 of Appellees' Condensed Recital Of Facts might be misleading because Appellees' transactions were made on the installment basis "with the exception of a very few cash deals." (See paragraph 8 of Findings of Fact of Marion Circuit Court).

As to paragraph 10 of Appellees' Condensed Recital Of Facts, there is nothing in the record to support the assertion that "all deeds, as required by statute, were recorded in Indiana." It was stipulated by Appellees' counsel, and the Marion Circuit Court found:

> "As the agreements were paid up, deeds in the form in evidence as Plaintiff's Exhibits 11 and 12 were executed in Chicago, Illinois, and delivered in Chicago, Illinois, by the plaintiff to the persons entitled thereto, and the grantees attended to the recording of the deeds in the appropriate County in Indiana if such grantees desired to record their deeds."

Moreover, there is no Indiana statute which "required"

such deeds to be recorded. Delivery of the deeds in Chicago, Illinois, passed title. *Armstrong* v. *Azimon* (1948), 76 N.E. (2d) 692; *Blair* v. *Whitaker* (1903), 31 Ind. App. 664, 69 N.E. 182; *Shirk* v. *Thomas* (1889), 121 Ind. 147; 22 N.E. 976.

Many material facts are either not referred to at all in Appellees' Condensed Recital of Facts, or are inadequately set forth. Examples are the facts found in paragraphs 11, 12, 13, 14, 15, 16, 18, 23, 25, 26 and 29 of the Findings of Fact made by the Marion Circuit Court. We respectfully refer the Court to those Findings.

II.

Appellant's Assignment Of Errors.

This Court has on several occasions discouraged numerous, lengthy and repetitious assignments of error. (*Phillips* v. *Seymour* (1875), 91 U.S. 646; 23 L. Ed. 341; *Central Vermont Ry.* v. *White* (1914), 238 U.S. 507, 59 L. Ed. 1433; *Chesapeake and Del. Canal Co.* v. *United States* (1918) 250 U.S. 123; 63 L. Ed. 889). In *Local 167* v. *United States* (1933), 291 U.S. 293; 78 L. Ed. 804 this Court warned that violation of the rule against prolixity in assignments may in the future be taken as sufficient ground for dismissal of the appeal.

Under Rule 27(6) the Court may notice plain error even though not assigned or specified.

The object of the rule relating to assignment of errors is to enable the Court and opposing counsel to see on what points appellant's counsel intend to ask a reversal of the judgment and to limit the discussion to those points. (*Phillips* v. *Seymour, supra*) It is at once apparent from the discussion contained under subheads A, B and C of heading VI of Appellees' Statement Opposing Jurisdiction And Motion To Dismiss that Appellant's assignments have

enabled opposing counsel to see on what points Appellant's counsel intend to ask a reversal of the judgment below.

III.

The Record Presents Substantial Federal Questions.

This appeal presents an unusual fact situation never before presented to this Court. The following, among other, facts have been stipulated as correct by Appellees' counsel:

1. Appellant is a citizen of the United States and of the State of Illinois, is a *bona fide* resident of Chicago, Illinois, and his principal office and place of business has always been located in Chicago, Illinois.

2. In 1933 Appellant acquired the subdivisions known as Beverly Shores and Lake Shore located in Indiana on the Southern Shore of Lake Michigan, about 35 miles from Chicago, Illinois. At the time Appellant acquired these properties they had been subdivided into numerous lots, some of which had been sold and conveyed and others were subject to outstanding sales agreements. This land was suitable primarily for modest homes and cottages used mainly for vacation or resort purposes. There was practically no market for the lots in Indiana, the only available market being in the metropolitan district of Chicago.

3. The entire office force of Appellant (with possibly one or two exceptions) were non-residents of Indiana and worked at or from Appellant's Chicago office. Appellant had no bank account in Indiana, and kept none of his books or records in Indiana.

4. The written agreements used by Appellant provided that the purchaser should acquire no interest or equity in the real estate until the purchaser made all the payments and performed all of the covenants to be made and performed by the purchaser. The agreements provided that

the purchase price should be paid in installments over a period averaging five years with interest at 6% per year commencing either one or two years after the date of the agreement.

5. In order for Appellant successfully to obtain the written agreements, and make collections thereon, he had to maintain his Chicago office and organization; he had to engage in extensive activities outside the State of Indiana; and he had to engage in interstate activities, that is, transportation of prospective purchasers to and from Indiana, and the passage of Appellant, his salesmen and employees to and from Indiana.

6. It is a fact, and so stipulated by Appellees' counsel, that if Appellant had not engaged in these extensive out-of-state activities and interstate activities he would not have been able to obtain any written agreements relating to the sale of lots excepting for payments which would have equalled only a small percentage of the payments specified in the written agreements actually obtained as a result of the out-of-state and interstate activities.

7. The cost to Appellant and the intrinsic value of the lots did not exceed 20% of the principal payments specified in the written agreements.

8. All of Appellant's gross income was received by him outside the State of Indiana, and not less than 98% of such gross income was received from non-residents of Indiana.

9. All the written agreements were executed outside of Indiana and were physically kept outside of Indiana.

10. All deeds were executed and delivered in Illinois.

11. The costs and expenses of Appellant (exclusive of the cost of the lots) aggregated not less than 50% of the principal payments collected by him.

12. The taxes in question were exacted from Appellant

on the principal and interest payments when received by Appellant, even though the purchaser thereafter defaulted and never acquired any interest in Indiana land.

From the foregoing it is apparent that, even in those cases where the purchaser made all payments and later received a conveyance, a very substantial portion of Appellant's gross receipts were due to his out-of-state and interstate activities and only a minor portion represented the intrinsic value of the land transferred. It is also apparent that 100% of such gross receipts were subject to taxation in the State of Illinois where Appellant resided and conducted his business. Appellant is thus subjected to the risk of multiple taxes to which residents of Indiana conducting a similar business, but whose activities do not cross the State line, would not be exposed.

The question of whether Indiana can tax such gross receipts consistently with the due process clause of the Fourteenth Amendment to the Federal Constitution, Section 8 of Article I relating to commerce and Section 2 of Article IV relating to privileges and immunities of citizens, is a novel and substantial one. Prior decisions of this Court referred to in Appellant's Statement As To Jurisdiction indicate a negative answer.

Respectfully submitted,

(Raymond Harkrider)
38 South Dearborn Street
Chicago, Illinois

(Owen W. Crumpacker)
Hammond Building
Hammond, Indiana
Counsel for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No.

ROBERT BARTLETT, Both Individually and as Trustee,
Appellant,

vs.

GROSS INCOME TAX DIVISION, STATE OF INDIANA; THE INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION; INDIANA STATE REVENUE BOARD; THE HONORABLE HENRY F. SCHRICKER, Governor, F. SHIRLEY WILCOX, Treasurer, and JAMES M. PROPST, Auditor, respectively, of the State of Indiana, as and constituting the Revenue Board of the Indiana Department of State Revenue, and as members of the Board of the Department of Treasury, and

THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Appellees.

On Appeal From The Supreme Court Of The State Of Indiana
(Indiana Supreme Court Cause No. 28610)

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS APPEAL.

On December 20, 1950 Appellees served upon Appellant's counsel their Statement Opposing Jurisdiction And Motion To Dismiss.

Pursuant to Rules 12(3) and 7(3) of the Supreme Court of The United States, as amended, Appellant files this opposing Brief.

I.

Appellees' Condensed Recital Of Facts.

The Condensed Recital Of Facts contained in Appellees' Motion is wholly insufficient. It omits many material facts found in the Stipulations of Fact signed by Appellees' counsel and filed in the Marion Circuit Court, which are embodied in Findings of Fact made by that Court. These Findings of Fact are set forth verbatim in Appellant's Statement As To Jurisdiction.

Paragraph 5 of Appellees' Condensed Recital Of Facts might be misleading because Appellees' transactions were made on the installment basis "with the exception of a very few cash deals." (See paragraph 8 of Findings of Fact of Marion Circuit Court).

As to paragraph 10 of Appellees' Condensed Recital Of Facts, there is nothing in the record to support the assertion that "all deeds, as required by statute, were recorded in Indiana." It was stipulated by Appellees' counsel, and the Marion Circuit Court found:

> "As the agreements were paid up, deeds in the form in evidence as Plaintiff's Exhibits 11 and 12 were executed in Chicago, Illinois, and delivered in Chicago, Illinois, by the plaintiff to the persons entitled thereto, and the grantees attended to the recording of the deeds in the appropriate County in Indiana if such grantees desired to record their deeds."

Moreover, there is no Indiana statute which "required"

such deeds to be recorded. Delivery of the deeds in Chicago, Illinois, passed title. *Armstrong* v. *Azimon* (1948), 76 N.E. (2d) 692; *Blair* v. *Whitaker* (1903), 31 Ind. App. 664, 69 N.E. 182; *Shirk* v. *Thomas* (1889), 121 Ind. 147; 22 N.E. 976.

Many material facts are either not referred to at all in Appellees' Condensed Recital of Facts, or are inadequately set forth. Examples are the facts found in paragraphs 11, 12, 13, 14, 15, 16, 18, 23, 25, 26 and 29 of the Findings of Fact made by the Marion Circuit Court. We respectfully refer the Court to those Findings.

II.

Appellant's Assignment Of Errors.

This Court has on several occasions discouraged numerous, lengthy and repetitious assignments of error. (*Phillips* v. *Seymour* (1875), 91 U.S. 646; 23 L. Ed. 341; *Central Vermont Ry.* v. *White* (1914), 238 U.S. 507, 59 L. Ed. 1433; *Chesapeake and Del. Canal Co.* v. *United States* (1918) 250 U.S. 123; 63 L. Ed. 889). In *Local 167* v. *United States* (1933), 291 U.S. 293; 78 L. Ed. 804 this Court warned that violation of the rule against prolixity in assignments may in the future be taken as sufficient ground for dismissal of the appeal.

Under Rule 27(6) the Court may notice plain error even though not assigned or specified.

The object of the rule relating to assignment of errors is to enable the Court and opposing counsel to see on what points appellant's counsel intend to ask a reversal of the judgment and to limit the discussion to those points. (*Phillips* v. *Seymour, supra*) It is at once apparent from the discussion contained under subheads A, B and C of heading VI of Appellees' Statement Opposing Jurisdiction And Motion To Dismiss that Appellant's assignments have

enabled opposing counsel to see on what points Appellant's counsel intend to ask a reversal of the judgment below.

III.

The Record Presents Substantial Federal Questions.

This appeal presents an unusual fact situation never before presented to this Court. The following, among other, facts have been stipulated as correct by Appellees' counsel:

1. Appellant is a citizen of the United States and of the State of Illinois, is a *bona fide* resident of Chicago, Illinois, and his principal office and place of business has always been located in Chicago, Illinois.

2. In 1933 Appellant acquired the subdivisions known as Beverly Shores and Lake Shore located in Indiana on the Southern Shore of Lake Michigan, about 35 miles from Chicago, Illinois. At the time Appellant acquired these properties they had been subdivided into numerous lots, some of which had been sold and conveyed and others were subject to outstanding sales agreements. This land was suitable primarily for modest homes and cottages used mainly for vacation or resort purposes. There was practically no market for the lots in Indiana, the only available market being in the metropolitan district of Chicago.

3. The entire office force of Appellant (with possibly one or two exceptions) were non-residents of Indiana and worked at or from Appellant's Chicago office. Appellant had no bank account in Indiana, and kept none of his books or records in Indiana.

4. The written agreements used by Appellant provided that the purchaser should acquire no interest or equity in the real estate until the purchaser made all the payments and performed all of the covenants to be made and performed by the purchaser. The agreements provided that

the purchase price should be paid in installments over a period averaging five years with interest at 6% per year commencing either one or two years after the date of the agreement.

5. In order for Appellant successfully to obtain the written agreements, and make collections thereon, he had to maintain his Chicago office and organization; he had to engage in extensive activities outside the State of Indiana; and he had to engage in interstate activities, that is, transportation of prospective purchasers to and from Indiana, and the passage of Appellant, his salesmen and employees to and from Indiana.

6. It is a fact, and so stipulated by Appellees' counsel, that if Appellant had not engaged in these extensive out-of-state activities and interstate activities he would not have been able to obtain any written agreements relating to the sale of lots excepting for payments which would have equalled only a small percentage of the payments specified in the written agreements actually obtained as a result of the out-of-state and interstate activities.

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From the foregoing it is apparent that, even in those cases where the purchaser made all payments and later received a conveyance, a very substantial portion of Appellant's gross receipts were due to his out-of-state and interstate activities and only a minor portion represented the intrinsic value of the land transferred. It is also apparent that 100% of such gross receipts were subject to taxation in the State of Illinois where Appellant resided and conducted his business. Appellant is thus subjected to the risk of multiple taxes to which residents of Indiana conducting a similar business, but whose activities do not cross the State line, would not be exposed.

The question of whether Indiana can tax such gross receipts consistently with the due process clause of the Fourteenth Amendment to the Federal Constitution, Section 8 of Article I relating to commerce and Section 2 of Article IV relating to privileges and immunities of citizens, is a novel and substantial one. Prior decisions of this Court referred to in Appellant's Statement As To Jurisdiction indicate a negative answer.

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